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No. 1267

APR 19 1961

SUPREME COURT OF THE UNITED STATES

EARL TUNGET,

Petitioner,

vs.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF KENTUCKY

COMMONWEALTH OF KENTUCKY,

Respondent.

ROBERT W. HELLIGER
Louisville, Kentucky,
of Counsel.

SUPREME COURT OF THE UNITED STATES

EARL TUNGET,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Earl Tunget, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the Commonwealth of Kentucky in the cause entitled "Earl Tunget v. Commonwealth of Kentucky" said case not yet reported, but which was rendered by the Court of Appeals of Kentucky on December 17, 1946. See 198 S. W. (2d) (Adv. Sheets) 785, 303 Ky. Adv. Sheets, 834. A petition for rehearing was filed on January 15, 1947, which was heard, considered and overruled by the Court of Appeals of Kentucky on the 7th day of February, 1947, and on the

latter date the opinion of the Court of Appeals of Kentucky and the judgment of the Circuit Court of Lyon County, Kentucky, became final, fixing the penalty of your petitioner at death in the electric chair.

ACTION IN THE STATE COURTS

An indictment was returned by the Grand Jury of Lyon County, Kentucky, charging your petitioner with murder. Trial was begun upon said indictment in the Lyon Circuit Court on the 22nd day of August, 1946, before the court and jury. The jury found your petitioner guilty as charged in the indictment and fixed his punishment at death in the electric chair, and judgment was duly pronounced and entered by the court sentencing your petitioner to be executed. An appeal was immediately prosecuted from this judgment to the Court of Appeals of Kentucky, the highest Court of the Commonwealth. The opinion of that Court affirming the judgment was rendered on December 17, 1946; a petition for rehearing was filed on January 15, 1947, and was considered by the Court of Appeals and overruled on February 7, 1947, and the judgment of conviction became final on the latter date. This petition for a Writ of Certiorari is filed within three months of the time when said judgment became final and there is presented herewith a certified copy of the entire record and proceedings in connection with said indictment, trial and conviction and the opinion of the Court of Appeals affirming the judgment of conviction of the Lyon Circuit Court.

Your petitioner states that he has exhausted all remedies afforded by the courts of the Commonwealth of Kentucky and that he has presented his case to the court of last resort in the Commonwealth of Kentucky,

and that this petition for a Writ of Certiorari is filed under the provisions of Title 28, U. S. C. A., Section 344 (b), Section 237 Judicial Code as amended.

SUMMARY AND BRIEF STATEMENT OF MATTERS INVOLVED—QUESTIONS PRESENTED

Your petitioner states that the questions presented herein are whether or not your petitioner has been afforded such a trial for his life and liberty as is guaranteed by the provisions of the Constitution of the United States;

Whether or not the trial of your petitioner upon the charge of wilful murder violated Article IV, Section 2, of the Constitution of the United States, which reads as follows:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states,"

Whether said trial and conviction of the petitioner violated Amendment XIV, Section 1, of the Constitution of the United States which reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law,"

in that your petitioner was required to plead and remain throughout the entire trial upon a charge of

murder while under shackles in the presence of the court and in the presence of the jury which tried him, over the objection of your petitioner and after your petitioner had by motion requested the trial court to order said shackles removed from your petitioner during the trial in the Lyon Circuit Court, all of which is shown by certified copy of the record which is filed herewith.

It was conceded by the Court of Appeals of Kentucky that only in "exceptional" cases would that court permit a defendant to be tried for a crime while such defendant was shackled, and then only when it appeared that the trial court had evidence upon which to form a belief that such defendant might attempt to do violence to the court or bystanders, or attempt to escape during the trial. See pages 3 and 4 of the prepared opinion, and Blair v. Commonwealth, 171 Ky. 319, 188 S. W. 390.

Your petitioner states that no proof of any kind was heard by the Lyon Circuit Court as to any danger to anyone from the then defendant or as to any possibility of his escape during the trial, and that this record does not disclose that the trial court held any hearing, or was inpossession of any evidence of any kind, upon this question. The record does disclose that the first appearance of your petitioner in the court room was under shackles and that your petitioner raised the question of violation of his rights at that time by a motion made in the Lyon Circuit Court to remove said shackles. (See page 9 of the record.) This motion was made and overruled by the trial court before any juror had been examined and without the court's having heard any testimony of any kind as to the probable conduct of your petitioner in the Lyon Circuit Court.

Your petitioner states that this question as to the violation of his right to equal protection of the law and due process of law under the Constitution of the United States was squarely presented to the Court of Appeals of Kentucky, the court of last resort of that Commonwealth, in the record, the motion and grounds for a new trial made in the Lyon Circuit Court, the Bill of Exceptions signed and approved by the trial judge, in the brief of petitioner, and especially in his petition for rehearing filed on January 15, 1947, which is in words and figures as follows:

"APPELLANT'S PETITION FOR REHEARING"

"Now comes the appellant, Earl Tunget, within the time provided by the rules of the court and files this petition for rehearing and for a reversal of the court's judgment and opinion because:

I: The opinion and judgment of the court, in so far as it applies to the matter of trial while in handcuffs, has set forth a doctrine of law that a different type of trial might be conducted for a defendant with a previous criminal conviction from that for a defendant who has had no previous record of arrest or conviction. This we believe constitutes a denial to certain classes of defendants, the 'equal protection of the law.'

"II: The opinion and judgment of the court, in so far as it applies to the matter of trial while in handcuffs, denies to the defendant the right to have the jury determine for itself the degree and nature of his guilt in that it permits the presiding judge to present to the jury his own opinion of the defendant's character by allowing the said judge to order trial of a defendant while in handcuffs. This we believe consti-

tutes a denial to the defendant of his right to 'public trial, by an impartial jury.'

"III: The opinion and judgment of the court, in so far as it applies to the matter of trial while in handcuffs, by allowing the court to order trial while in handcuffs before the apparent need at time of trial arises, allows 'the compelling of the defendant in a criminal case to be a witness against himself.'

"IV: The opinion and judgment of the court, in so far as it applies to the matter of trial while in handcuffs, serves to encourage juries to give to repeaters two punishments—one for the crime charged in the indictment and one for the crime previously charged and for which punishment has already been imposed. This we believe is contrary to the precept 'nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.'

"For the reasons set forth the appellant believes that the opinion of the court does not consider the rights of the defendant as guaranteed by the Constitution of the United States and the Constitution and Bill of Rights of the Commonwealth of Kentucky.

"Lest the opinion of the court in one case deprive the citizens of the Commonwealth of their guaranteed rights, we believe that appellant's petition for rehearing should be sustained."

Your petitioner urges that the Court of Appeals of Kentucky erred in affirming the judgment of the Lyon Circuit Court fixing the penalty of your petitioner at death and by failing and refusing to reverse the judgment of the Lyon Circuit Court upon your petitioner's claim, and the showing of the record, that he had been denied equal protection of the law and due process of law in violation of the Constitution of the United States.

JURISDICTION

This Court has jurisdiction as provided in Title 28, U. S. C. A., Section 344(b), Section 237 Judicial Code as amended, to review by certiorari the action of the Court of Appeals of Kentucky which erroneously construed the provisions of the Federal Constitution and thereby ordered your petitioner deprived of his life without affording him equal protection of the law and due process of law as required by Article IV, Section 2, and Amendment XIV, Section 1, of the Constitution of the United States.

ASSIGNMENT OF ERRORS

The Court of Appeals of Kentucky erred:

(1) In affirming the judgment of the Lyons Circuit Court pronounced upon the then defendant after a verdict of the jury when the defendant was required to appear for the first time, and to remain before the court and jury throughout the trial of his case, under shackles;

(2) In holding that your petitioner was not deprived of due process of law and equal protection of the law under the Constitution of the United States by being required to appear for trial on the indictment in the Lyon Circuit Court while shackled;

(3) In holding that the trial court did not deprive your petitioner of due process of law and equal protection of the law and did not abuse its discretion in refusing to sustain the motion made by your petitioner at the beginning of the trial in the Lyon Circuit Court that the shackles be removed from him during said trial;

(4) In denying your petitioner due process of law in that he was required to first appear in the

Lyon Circuit Court under shackles and required to remain under shackles throughout the entire trial after motion made to the trial judge to order said shackles removed had been denied, without the hearing of any proof by said judge as to whether or not your petitioner was about to, or had attempted to, escape or do violence to anyone while being tried upon the charge of murder in said Lyon Circuit Court, all of which your petitioner states was erroneously approved and affirmed by the Court of Appeals of Kentucky, the court of last resort in that Commonwealth;

(5) In affirming the judgment of the Lyon Circuit Court when your petitioner, by reason of the shackles upon him, was, in effect, required to give evidence against himself in that such shackling was evidence considered by the jury as to the character of the defendant then upon trial;

(6) In affirming the judgment of the Lyon Circuit Court after the Lyon Circuit Court had required your petitioner to appear in said court while shackled, which brought to the attention of the jury then trying him the fact that the then defendant had been previously tried and convicted for a crime for which punishment had already been imposed upon him.

REASONS FOR ALLOWANCE OF WRIT

In view whereof, your petitioner respectfully urges that Writ of Certiorari should issue because:

(1) In so affirming the judgment of the Lyon Circuit Court the Court of Appeals of Kentucky erroneously decided a question arising under the Constitution of the United States adversely to your petitioner's contention and, it is believed, contrary to the provisions and intention of the Constitution of the United States and the decisions of this Court:

(2) The matter at issue is the life of your petitioner and the carrying out of the judgment of the Lyon Circuit Court, and the death sentence imposed upon your petitioner, should not be permitted because obtained in violation of your petitioner's constitutional rights as guaranteed by the Constitution of the United States;

(3) The opinion of the Court of Appeals of Kentucky in affirming the judgment of the Lyon Circuit Court erroneously interpreted the Constitution of the United States and erroneously held that the trial and judgment of your petitioner in the Lyon Circuit Court did not violate his constitutional rights, viz: equal protection of the law, due process of law, and immunity from being required to give evidence against himself, all of which are guaranteed to your petitioner by provisions of the Constitution of the United States;

(4) The Court of Appeals of Kentucky has decided a question involving the construction of the Constitution of the United States, which question has not been directly passed upon by this Court;

(5) Your petitioner shows in this petition and in the brief attached hereto that the opinion of the Court of Appeals of Kentucky is contrary to the former opinions of said court, and that the identical question

now submitted to this Court has been passed upon by the courts of last resort in various states of the United States and, so far as we have been able to ascertain, the opinions of those courts have universally upheld the contention now made by your petitioner. It will thus appear that if the opinion of the Court of Appeals of Kentucky is permitted to remain unreversed, a citizen of the Commonwealth of Kentucky can be tried upon a criminal charge when in shackles, while citizens of other states of the United States cannot be so tried. It is therefore respectfully submitted by petitioner that it is necessary that this Honorable Court decide the question here involved not only on account of its importance, but because the opinion of the Court of Appeals of Kentucky in this case conflicts with its former opinions and conflicts with the decisions of many other courts of last resort of the states of the United States.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court directed to the Court of Appeals of the Commonwealth of Kentucky to the end that the judgment of the Court of Appeals of the Commonwealth of Kentucky be reviewed and reversed, with costs, by this Honorable Court.

EARL TUNGET, *Petitioner,*

By: FUNK, CHANCELLOR & DARNELL,

By: A. S. Funk R,

Attorneys for Petitioner.

Of Counsel:
ROBERT W. ZOLLINGER,
Louisville, Ky.

No. 1267

SUPREME COURT

EARL TUTSKY

Vs.

COMMONWEALTH OF

[redacted]
Louisville, Kentucky,
of Counsel.

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SUPREME COURT OF THE UNITED STATES

EARL TUNGET, - - - - - - - - - *Petitioner,*

v. BRIEF IN SUPPORT OF PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

COMMONWEALTH OF KENTUCKY, - - *Respondent.*

MAY IT PLEASE THE COURT:

STATEMENT OF FACT

Your petitioner, Earl Tunget, states to the Court that he was tried upon a charge of murder in the Lyon Circuit Court, a district court of the Commonwealth of Kentucky, on the 22nd day of August, 1946; that he was found guilty as charged and a verdict of the jury fixing his punishment at death in the electric chair was returned; that sentence was duly pronounced upon said verdict by the Judge of the Lyon Circuit Court; that from said judgment and sentence your petitioner appealed to the Court of Appeals of Kentucky, the court of last resort of that Commonwealth; that the Court of Appeals of Kentucky affirmed the judgment of the Lyon Circuit Court in a decision handed down on December 17, 1946, (said case now reported in 198

S. W. (2d) Adv. Sheets, 785; 303 Ky. Adv. Sheets, 834); that a petition for rehearing was filed on January 15, 1947, which was heard, considered and overruled by the Court of Appeals of Kentucky on February 7, 1947, and that your petitioner has now exhausted all remedies available to him in the courts of the Commonwealth of Kentucky.

Your petitioner states that at the time he was brought into the Lyon Circuit Court to answer the indictment upon the charge of murder, there was around his body a wide leather belt; that on his hands and wrists were handcuffs; that these handcuffs were attached to the belt which was fastened around his body and that he was required to remain so shackled throughout the entire trial, although motion was made to the court before the trial commenced to remove the shackles from the defendant while he was on trial (Tr. of record, page 9).

Your petitioner has filed in this Court a petition for a Writ of Certiorari to the Court of Appeals of the Commonwealth of Kentucky seeking to have this Court review the trial and conviction of your petitioner and to reverse the decision of the Court of Appeals of Kentucky for errors in that opinion which violate the rights of your petitioner as guaranteed to him under the provisions of the Constitution of the United States.

JURISDICTION OF THE SUPREME COURT

The petition for a Writ of Certiorari is filed under the provisions of Title 28, U. S. C. A. Section 344(b), Section 237 Judicial Code as Amended. See

Hale v. Commonwealth of Kentucky
30 U. S. 613-616
82 L. Ed. 1050

Norris v. Alabama
294 U. S. 587
79 L. Ed. 1074

Powell v. Alabama
287 U. S. 45-77
77 L. Ed. 158

The three above cited cases establish the principle that an opinion of the highest court of a State may be reviewed by the Supreme Court of the United States on Writ of Certiorari where the provisions of the United States Constitution have been erroneously construed and equal protection of the law and due process of law thereby denied to a citizen.

PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES DISCUSSED HEREIN

Article IV, Section 2 of the Constitution of the United States, reading as follows:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states."

Fourteenth Amendment, Section 1, Constitution of the United States, reading as follows:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

ERRORS IN THE TRIAL AND CONVICTION OF PETITIONER IN THE CIRCUIT COURT AND IN THE OPINION OF THE COURT OF APPEALS OF KENTUCKY

1. Petitioner was denied the equal protection of the law as guaranteed by the Fourteenth Amendment, Section 1, of the Constitution of the United States in that he was required to appear for trial in shackles and so remain throughout the trial. The Court of Appeals of Kentucky, the highest court of that Commonwealth, erred in holding, in effect, that a different type of trial might be conducted for a defendant with a previous criminal conviction from that afforded a defendant who had no previous record.

2. The trial court erred, and this error was affirmed by the Court of Appeals of Kentucky, in overruling your petitioner's (then defendant) motion to remove his shackles and handcuffs. This ruling of the trial court was made without hearing any evidence of any kind as to the necessity of shackling and handcuffing the accused during the course of his trial in the Lyon Circuit Court, and denied your petitioner rights guaranteed him by the Constitution of the United States in Article IV, Section 2, which guarantees the

citizens of each state the same privileges and immunities of citizens of the several states.

3. The trial court erred, and this error was affirmed by the Court of Appeals of Kentucky, in requiring your petitioner, then defendant, to appear in the courtroom shackled, thereby depriving your petitioner of his rights as guaranteed under the Fourteenth Amendment to the Constitution of the United States in that he was required to be a witness against himself and, in effect, was put in jeopardy for the offense for which he had already been tried and convicted, the shackles being evidence that in the opinion of the trial judge the accused was a dangerous and desperate character which prejudiced the jury against the defendant and denied his right to a public trial by an impartial jury.

ARGUMENT

The question here presented is whether or not the constitutional rights of an accused are violated when he is required to appear in shackles before court and jury throughout his trial, although proper motion was made that the court order such shackles removed.

Counsel for your petitioner have been unable to find any decision of this Court passing directly upon this question. However, we will attempt to point out to the Court that such a trial is (1) violative of the rights of the accused at common law and under the Constitution of the United States, Article IV, Section 2, and the Fourteenth Amendment, Section 1; (2) contrary to the decisions of the courts of last resort of other states of the United States; and, (3) contrary to former decisions of the Court of Appeals of Kentucky:

THE RIGHTS OF AN ACCUSED AT COMMON LAW IN ENGLAND ARE PRESERVED TO HIM BY THE CONSTITUTION OF THE UNITED STATES AND ONE OF THOSE RIGHTS WAS THAT THE ACCUSED BE FREE OF SHACKLES DURING HIS TRIAL

It has been and is a well defined and universally accepted rule of constitutional construction that the Constitution of the United States is to be construed as guaranteeing by substantive law those privileges and rights which had grown up in the common law and the statute law of England. In the case of Maddox v. United States, 156 U. S. 237, 15 Sup. Ct. 337, this Court said:

> "We are bound to interpret the constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizens, but as securing to every individual such as he possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Charta."

One of the rights referred to in the quotation supra was the right of the accused to have shackles removed from him during his trial as is shown by the discussion in Layers Case (16 Howell's St. Tr. 94), in the following language: (Layer was tried for high treason in 1722.)

> " 'My Lord,' said the prisoner, 'I hope I shall have these chains taken off, that I may have the free use of that reason and understanding which God hath given me.' To which the Lord Chief Justice replied, 'As to the chains you complain of, it must be left to those to whom the custody of you is committed to take care that you may not make

your escape; when you come to the trial, then your chains may be taken off.' Counsel for the prisoner said: 'Your Lord hath limited it as an indulgence extended to him when he comes to his trial that his irons shall be taken off; but I humbly insist upon it that by law he ought not to be called upon even to plead till his fetters are off. My Lord Coke is clearly of that opinion in his Pleas of the Crown, and it is admitted by all hands that, when he comes to be tried, his shackles must be off; and upon debate it was so determined in Cramburne's case (13 Howell 222). The only reason for putting of irons at all on a prisoner is to keep him in safe custody; and the reason why they are taken off in the course of proceedings against him in a Court of Justice seems to be that his mind should not be disturbed by any uneasiness his body or limbs should be under.' The Lord Chief Justice said: 'No doubt, when he comes upon his trial the authority is that he is not to be invinculis during his trial but should be so far free that he should have the use of his reason and all advantages to clear his innocence.' "

In Cranburne's case (A.D. 1699, 3 Howell) when the defendant was brought to the bar in irons the Lord Chief Justice (Holt) exclaimed:

" 'Look you, keeper, you should take off the prisoner's irons when they are in the bar, and they should stand at their ease when they are tried.' "

Hawkins says (2 Pleas of the Crown, Ch. 28):

"Every person, at the time of his arraignment, ought to be used with all the humanity and gentleness that is consistent with the nature of the thing, and under no other terror or uneasiness than what proceeds from a sense of his guilt and the misfortune of his present circumstances; and,

therefore, ought not to be brought to the bar in a contumelious manner, as with hands tied together, or any other mark of ignomy or reproach, not even with fetters on his feet, unless there be some danger of a rescue or escape."

Fleta, when speaking of prisoners brought up for trial, said:

"Non producatur ligati, ne videantur respondere coacti."

Bracton's language as quoted by Lord Coke is:

"He shall not be brought before the justices with his hands bound, though sometimes on account of danger of escape, his feet are fettered."

The rule seems to be unchanging and at least as old as Magna Charta.

THE OPINION OF THE COURT OF APPEALS OF KENTUCKY, AFFIRMING ERRORS COMMITTED DURING THE TRIAL OF ACCUSED, IS IN CONFLICT WITH THE OPINIONS OF COURTS OF LAST RESORT OF OTHER STATES OF THE UNITED STATES

Since we have not been able to find an opinion of the Supreme Court upon the question here presented, we feel it proper to cite opinions of the courts of last resort of various states of the United States, believing that such opinions will be helpful and persuasive to this Court, as establishing that freedom from shackles is one of the ancient English rights that was transplanted into the United States as a right naturally adhering to citizens of a free country.

One of the best opinions we have been able to find as to the violation of the rights of an accused by keeping him in shackles during his trial is the case of State of California v. James Harrington and William Minor reported in 42 Calif. Repts. 165. The defendants were tried and convicted for the crime of robbery and the only point raised on appeal was that they were tried in irons after motion had been made that they be unfettered. The California court said:

> "The question then is whether the prisoner placed upon his trial for a felony, can, as a legal or constitutional right, demand that during his trial, while before the Court and jury, his limbs should not be manacled, or that he should not be in vinculis during his trial, there being no pretense of necessity for such restraint to secure his continued presence in Court.
>
> "It has ever been the rule at common law that a prisoner brought into the presence of a Court for trial, upon a plea of not guilty to an indictment

for any offense, was entitled to appear free of all manner of shackles or bonds; and prior to 1722 when a prisoner was arraigned, or appeared at the bar of a Court to plead, he was presented without manacles or bonds, unless there was evident danger of his escape (2 Hales Pleas of the Crown, 219; 4 Blackstone Comm. 322, and Layers Case, 6 State Trials, 4th Edition by Hargrave, 230, 231, 244, 245; Waite's Case, in Leach's Cases in Crown Law, 36).

"The Legislature of this State, at its first session, declared that 'the common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States or the Constitution or laws of the State of California shall be the rule of decision in all the courts of this state." * * *

"A prisoner upon his trial in Court is in the custody of the law and under the immediate control of and subject to the orders of such Court. Should the Court refuse to allow a prisoner on trial to manage and control, in person, his own defense, or refuse him the aid of counsel in the conduct of such defense, he would manifestly be deprived of a constitutional right, and a judgment against him on such trial would be reversed. In my opinion any order or action of the Court which, without evident necessity, imposes physical burdens, pains, and restraints upon a prisoner during the progress of his trial, inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and prejudically affect his constitutional rights of defense, and especially would such physical bonds and restraints in like manner materially affect his statutory privilege of becoming a competent witness and testifying in his own behalf.

"Again, to require a prisoner during the progress of his trial before the Court and jury to appear and remain with chains and shackles upon

his limbs, without evident necessity for such restraint, for the purpose of securing his presence for judgment, is a direct violation of the common law rule * * *.

"In the present case there was no pretense of necessity for manacles and chains upon the defendants during the trial to secure their presence to answer the judgment." Judgment reversed.

In the case of State v. Williams, 39 L. R. A. 821, the Supreme Court of the State of Washington held that the trial court erred in refusing the request of appellant that manacles be removed from those persons, one of whom was in the courtroom as a witness, who had been jointly charged with the same crime as the defendant, and used this language:

"When the court allows a prisoner to be brought before a jury with his hands chained in irons and refuses on his application or that or his counsel to order their removal, the jury must necessarily conceive a prejudice against the accused as being, in the opinion of the judge, a dangerous man and one not to be trusted, even under the surveillance of officers. Besides the condition of the prisoner in shackles may, to some extent, deprive him of the free and calm use of all of his faculties. Section 22 of our Constitution (Washington) declares that in criminal prosecutions the accused shall have the right to appear and defend in person. The right here declared is to appear with the use of not only his mental but his physical faculties unfettered and unless some compelling necessity demands the restraint of the prisoner for his own custody, the binding of the prisoner in irons is a plain violation of the constitutional guaranty."

In the case of State v. Kring, 1 St. Mo. App. 438, the court very carefully considered the question of re-

moval of shackles during the trial of the accused. Kring was charged with the murder of Dora Broemser and was brought into court manacled; motion was made to remove the mancles and the trial court refused to grant the motion stating that accused had made an assault on J. G. Broemser, the husband of the deceased, in open court when the accused was last present there. The appeal court said:

> "It is laid down in the ancient books of the law that, though under indictment of the highest nature, as murder or high treason, the prisoner must be brought to the bar without irons or any manner of shackles or bonds; unless there be evident danger of escape, and then he may be secured by irons. * * * And though fetters be allowed on the feet, in case of danger of an escape, all authorities say that his hands must not be bound, as was done to the prisoner in the case at bar.
>
> "It is not pretended in this case that there was danger of escape. Had this danger existed, however, we are of the opinion that some other means must have been taken to prevent it, and that it would have been error, even then, to keep the prisoner's hands fettered in the presence of the jury during the trial of the case.
>
> "It is said in excuse that the prisoner when last there—by which is probably meant when last in Court—had made an assault upon a bystander. The bystander assaulted on the former case and named in the record was not a person whose attendance at the trial was required as counsel, witness, jurymen, or officer of the court. It does not appear what interval of days, weeks or months existed between this former assault and the day of the trial; nor that there was any ground to suppose that such an assault would be renewed. But, be that as it may, it was not sufficient reason for compelling the prisoner to stand his trial for his

life with gyves upon his wrists and his hands bound together. Officers of the Court could have been placed around him, if he was considered dangerous to bystanders, or he might have been placed in an enclosed space within the bar of the court, as was the English custom. Any proper precautions against escape, or to guard against danger of violence from a prisoner, may be taken during the trial; these may be such as will not deprive his counsel of free communication with him, and will not tend to inflict physical torture upon the prisoner, or deprive him of the freest use of his limbs and of all his faculties in that moment of extreme jeopardy but it is certainly not permitted to fetter his hands; and, if he is brought into Court in irons, he is entitled to have them removed whilst actually on trial; and it is error in the Court to refuse to order the prisoner to be unbound."

This case was appealed to the court of last resort of Missouri and is reported as State v. Kring, 64 Mo. 591, and that court used this language:

"The English authorities, to sustain the conclusion of the Court of Appeals, are referred to in the opinion, and also in the brief of the counsel for defendant in this Court, to which may be added a decision in California (People v. Harrington, 42 Cal. 165) referred to by the Attorney General. From all of these cases, it seems very clear, that without some good reason, authorizing the criminal court to depart from the general practice in England and in this country, shackles of the prisoner, when brought before the jury for trial, should be removed.

"We have no doubt of the power of the criminal court, at the commencement or during the progress of the trial, to make such orders as may be necessary to secure a quiet and safe one,

but the facts stated by the court in this case, as shown by the record, that the prisoner had assaulted a person in Court, about three months before the term at which he was tried, would hardly authorize the Court to assume that on his trial for life, he would be guilty of similar outrages. There must be some reason, based on the conduct of the prisoner *at the time of the trial,* to authorize so important a right to be forfeited. When the Court allows a prisoner to be brought before a jury with his hands chained in irons, and refuses, on his application, or that of his counsel, to order their removal, the jury must necessarily conceive a prejudice against the accused, as being in the opinion of the judge a dangerous man, and one not to be trusted, even under the surveillance of officers. Besides the condition of the prisoner in shackles may, to some extent, deprive him of the free and calm use of his faculties. We therefore concur in the opinion of the Court of Appeals on this point."

The same principle of law was invoked in the case of Matthews v. State, 9 Lea (Tenn.) 128, although this case was affirmed. The facts in this case were that the lower court by inadvertance permitted the defendant to remain shackled while two of the jurors were being questioned and seated and that the shackles were removed immediately when they were noticed by the court. The opinion of the Supreme Court of Tennessee held that this inadvertant shackling for a brief period did not violate the constitutional rights of the accused, but added that had he been forced to remain shackled during the entire trial his rights would have been violated.

The facts in the case of State v. Smith, 110 Oregon Reports 207, appear to be quite similar to the facts in the case here at bar. Smith was indicted and tried for killing a guard who had him in charge. He was found

guilty and sentenced to death. One ground urged for reversal of the judgment was that the prisoner was kept with irons on his feet during his trial, motion having been made that he be unfettered at the commencement of the trial. The court said:

> "On the second point, that it was error to keep the prisoner in fetters during the trial, the opinion in the case of State of Missouri v. Kring (1 Mo. App. 438) leaves nothing to be said. That case was affirmed on appeal.
>
> "The point was ruled the same way in People v. Harrington, 42 Calif. 165, which seems to have been the first case in this country where this ancient rule of the common law was considered and enforced. It is unnecessary to notice other errors assigned. Case reversed."

THE OPINION OF THE COURT OF APPEALS OF KENTUCKY, AFFIRMING ERRORS COMMITTED DURING THE TRIAL OF ACCUSED WHICH VIOLATED CONSTITUTIONAL RIGHTS OF YOUR PETITIONER, IS IN CONFLICT WITH FORMER OPINIONS OF THAT COURT

The Constitution of Virginia contained the following provision:

> "That in criminal prosecutions a man * * * shall not be deprived of life or liberty, except by the law of the land * * *."

Section 6 of Article 8 of the first Constitution of Kentucky provided that all laws then in force in Virginia not inconsistent with the Kentucky Constitution which were of general nature and not local to the Eastern part of that Commonwealth should be in force

in the Commonwealth of Kentucky until altered or repealed by the Legislature. The proposition is universally accepted, on the authority of Lord Coke, that the words "due process of law" are equivalent in meaning to the words "law of the land." Therefore, the common law of England, as set out in the first cases cited in this brief, became a part of the law of Virginia and of the law of the Commonwealth of Kentucky and the trial of your petitioner while in shackles violated his constitutional rights under the Constitution of Kentucky.

The prepared opinion in your petitioner's case is also contrary to former opinions of the Court of Appeals of Kentucky. In the case of Blair v. Commonwealth, 171 Ky. 319, 188 S. W. 390, the Court of Appeals recognized that the constitutional rights of an accused would be violated if he were tried on a criminal charge while confined in shackles and in disposing of the question used this language:

> "It is the further contention of appellant that he was greatly prejudiced in his substantial rights and indeed prevented from having a fair trial by the action and ruling of the circuit court permitting him to be brought into court and in the presence of the jury by the jailer with handcuffs on and also handcuffed to another prisoner and to remain so manacled during the greater part of the trial, to which, as the record shows, he at the time objected and excepted. As the judgment must be reversed for errors already indicated it is unnecessary to declare whether this ruling of the court last set forth, of itself, constitutes such error as would require reversal. We, however, regard it as our duty to say that the manacling of a prisoner when upon trial for a criminal offense, whether in bringing him into court, while in the presence of the court or jury, or at any stage of the trial under

such circumstances as appear to have attended the handcuffing of appellant cannot be too strongly condemned. The record furnishes no justification for the great indignity to which he was thus subjected. Indeed, it could have been excused only on the grounds that it was necessary to prevent his escape, prevent injury to his own person, or probable danger to the court, its officers or to bystanders from his violence, or to prevent some such misconduct on his part as would have obstructed the work or business of the court, none of which grounds is manifested by the record here."

The Court of Appeals of Kentucky then adopted the statement of law laid down in 12 Cyc. 529, and also the law as stated in Ruling Case Law, page 68. In the latter citation there is cited with approval by the Court of Appeals of Kentucky the case of People v. Harrington, a California case cited above, the Matthews case from Tennessee, above cited, State v. Williams, a Washington case cited above, the case of State v. Temple (Missouri), and also the case of State v. Chase, 17 Ann. Cas. 520.

Error No. 2 complained of by your petitioner here is that he was denied rights guaranteed him by Article IV, Section 2, of the Constitution of the United States, which guarantees the citizens of each state the same privileges and immunities as citizens of the several states.

It is the contention of your petitioner that, if the opinion of the Court of Appeals of Kentucky is permitted to stand as written, it will permit the trial of a citizen of one state (Kentucky) on a criminal charge in a manner which is prohibited in many other states of the union. We believe this contention is thoroughly substantiated by the various opinions of the courts of last resort quoted supra, and we think it is thus defi-

nitely established that your petitioner has been denied the privileges and immunities of citizens of the several states as set out in Article IV, Section 2, of the Constitution.

Further, if the opinion of the Court of Appeals of Kentucky is permitted to stand as written, your petitioner has been denied, and one group of citizens of Kentucky will be denied, the right to be tried in the courts of this Commonwealth in the same manner and under the same circumstances as other citizens charged with the same crime will be tried in courts of equal dignity; that is, any accused who has been previously convicted for a crime may be tried while in shackles although a defendant, charged with the same crime, who has no previous record must not be tried under such restraint. This situation denies to one group of citizens the equal protection of the law and due process of law, and gives to another group privileges and immunities which are denied to the former group.

This statement of the law as laid down by the Court of Appeals of Kentucky in the Blair case, supra, was reaffirmed by the Court of Appeals in the case of Marion v. Commonwealth, 269 Ky. 729, 108 S. W. (2d) 721. However, it will be noted that in the Marion case the trial judge ordered the shackles removed as soon as a motion to that effect was made by counsel for the accused and the matter thereby called to his attention.

In the opinion of the Court of Appeals in your petitioner's case, Judge Siler, writing for the court, used this language:

> "Was it reversible error to keep appellant in handcuffs during the trial? As a general rule we would condemn such a practice. A court would hardly be justified in permitting this to be done in one murder case out of an average hundred coming to trial. However, we have heretofore announced

the rule to be that of permitting shackles on defendants during trial in exceptional cases—in cases where the trial court appeared to have encountered some good ground for believing such defendant might attempt to do violence or to escape during the trial. See Marion v. Commonwealth, 267 Ky. 729, 108 S. W. (2d) 721; Blair v. Commonwealth, 171 Ky. 318, 188 S. W. 390."

It appears from this opinion that the Court of Appeals recognized the constitutional rights of your petitioner to a trial in the Lyon Circuit Court free of all restraint or shackles unless the trial court found from evidence that your petitioner was about to escape or do violence to the court officials or bystanders during the progress of the trial. This record discloses that no testimony or proof of any kind was heard by the trial court at the time motion was made to remove your petitioner's shackles. The motion was timely made, but was immediately overruled without any hearing or any finding of fact by the trial judge. It may be argued that the trial court knew petitioner (then defendant) was charged with killing a guard at the penitentiary at Eddyville, Kentucky, but as said in the Kring case, supra, such knowledge would not authorize the court to assume that on his trial for life he would be guilty of further outrages. There must be some reason, based on the conduct of the prisoner *at the time of the trial,* to authorize so important a right to be forfeited.

Your petitioner earnestly insists that the action of the trial court in overruling his motion that shackles be removed from him during his trial violated his constitutional rights; that the Court of Appeals of Kentucky was in error in affirming his conviction under such circumstances, and that the prepared opinion is contrary to former opinions of that court resulting in

denial to your petitioner of due process of the law and of equal protection of the law.

THE RIGHTS OF YOUR PETITIONER WHICH WERE VIOLATED BY HIS TRIAL AND CONVICTION ARE SUCH INHERENT RIGHTS AS ARE GUARANTEED HIM BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Your petitioner contends that his trial while in shackles was a denial of due process of law, and that his right to be tried without shackles is of such a nature and so ancient that it is included in the conception of due process of law.

Counsel for your petitioner have carefully searched the opinions of this Court for definitions of "due process" and while it is apparent that the Court has refused to lay down any definite rules which, if not followed, constitute a violation of due process of law, the case of Twining v. New Jersey, 211 U. S. 78. 53 L. Ed. 97, sets out certain tests for the determination of the question. We here quote from that opinion:

> "First: What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. This test was adopted by the court, speaking through Mr. Justice Crutis, in Den ex dem. Murray v. Hoboken Land & Improv. Co., 18 How. 272, and (further citations). Of course, the part of the Constitution then before the court was the 5th Amendment. If any differ-

ent meaning of the same words, as they are used in the 14th Amendment can be conceived, none has yet appeared in Judicial decision. 'A process of law' said Mr. Justice Matthews, commenting on this statement of Mr. Justice Curtis, 'which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country.' Hurtago v. California, 110 U. S. 516, 28 L. ed. 232.

"Second: It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practiced by our ancestors, is an essential element of due process of law. If that were so, the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight jacket, only to be unloosed by constitutional amendment. That said Mr. Justice Matthews, in the same case, 'would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.' (Citations.)

"Third: But, consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action which have relation to process of law, and protect the citizen in his private right, and guard him against the arbitrary action of government. This idea has been many times expressed in differing words by this court, and it seems well to cite some expressions of it. The words 'due process of law' were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.' Bank of Columbia v. Okely, 4 Wheat 235, 4 L. ed. 559, and other citations. 'This court has never attempted to define with precision the words 'due process of law.' It is sufficient to say that there are certain immutable principles of

justice which inhere in the very idea of free government which no member of the union may disregard. Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780. 'The same words refer to that law of the land in each state, which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' Re Kemmler, 136 U. S. 436, 34 L. ed. 519."

The question of whether forcing your petitioner to stand in shackles before court and jury throughout his trial violated his constitutional rights may be tested by the application of these rules adopted by this Court.

Your petitioner most earnestly contends that the right to be tried free from shackles is so fundamental in due process that a refusal of the right is a denial of due process; that during the time when the meaning of "law of the land" and its synonymous term "due process of law" was being formulated and insisted upon, both in England and in the United States, those leaders in the fight for the securing and preserving the rights of the people entertained the view that the right was so fundamental that there could be no due process without it. This, we believe, is firmly established by the many citations from decisions of the English Courts in the Seventeenth and Eighteenth Centuries, and by the decisions of the courts of last resort of the States of the United States.

One of the rather recent decisions of this Court as to violation of the right of due process was rendered in Brown, Etc. v. State of Mississippi, 297 U. S. 278, 80 L. ed. 682. There the accused contended that confessions were obtained from them by force and this

Court held that such procedure violated their constitutional rights. In the course of the opinion the Court said:

> "The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it 'offends some principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental.' * * * But the freedom of the State in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. * * * The due process clause requires 'that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. * * * The duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure and wherever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective."

To summarize, your petitioner contends that his right to be tried free from shackles is an inherent and fundamental right; that it was so recognized in the Seventeenth Century in the Courts of England and was a firmly established principle of the jurisprudence of that country at the time the United States of America became an independent nation and adopted the Constitution containing the guarantee set out in the Fifth Amendment that "No person shall be deprived of life, liberty, or property, without due process of law"; that as said in the Twining case, supra, "If any different meaning of the same words, as they are used in the Fourteenth Amendment can be conceived, none has yet appeared in judicial decision," and that your petitioner's trial while confined in shackles flagrantly

violated his right to due process of law under the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

Your petitioner was tried on a charge of murder in the state courts of Kentucky and his punishment fixed at death; he prosecuted an appeal to the highest court of the Commonwealth of Kentucky and the conviction and sentence were there upheld. We earnestly insist that your petitioner's constitutional rights were violated during the trial of the charge against him; that this Court should grant the petition for a Writ of Certiorari to the Court of Appeals of Kentucky; should review the decision and opinion of said court and ultimately should reverse the decision of the Court of Appeals of Kentucky with directions to grant your petitioner a new trial to the end that justice may be done and that your petitioner may be given a trial in the Courts of the Commonwealth of Kentucky following such procedure as will protect the rights and privileges guaranteed to him by the Constitution of the United States.

Respectfully submitted,

FUNK, CHANCELLOR & DARNELL

By _____

Attorneys for Petitioner.

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Supreme Court of the United States

EARL TUNGET - - - - - - - - - - - Petitioner

vs.

COMMONWEALTH OF KENTUCKY - - Respondent

On Petition for Writ of Certiorari
To the Court of Appeals of Kentucky

RESPONSE AND BRIEF FOR RESPONDENT, COMMONWEALTH OF KENTUCKY

ELDON S. DUMMIT,
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Supreme Court of the United States

EARL TUNGET ..... *Petitioner*

VS.

COMMONWEALTH OF KENTUCKY ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

To the Honorable Chief Justice and Associate Justices of The Supreme Court of the United States:

JURISDICTION

Respondent at the outset of this brief must take issue with the Petitioner's statement that any constitutional question or any violation of the Federal Constitution was raised by Appellant until the judgment had been affirmed by the Court of Appeals. It was on petition for rehearing that an issue was raised of violation of Article IV, Section 2 of the Constitution of the United States, or Amendment XIV, Section 1, of the Constitution. This is a pure afterthought in an attempt to raise a Federal question. Little need be said of the first alleged violation, to-wit:—of

Article IV, Section 2, wherein citizens of each State are entitled to privileges and immunities of citizens of the several states. The theory, or rather, statement of the petition and brief, that Kentucky is the only State which has permitted the shackling of a prisoner during a trial, wherein the court exercised its discretion to permit same and is a precedent universally denied in other States, shows that Petitioner's attorneys have not investigated the authorities on this question. It is the universal rule above in text and precedent that the shackling of a prisoner during a trial is within the sound discretion of the trial court. While it is an extraordinary proceeding as in this case, when the facts authorize and justify, it is done, and the courts have upheld it in numerous cases.

As to the violation of the Amendment XIV of the Federal Constitution which prohibits a State from depriving any person of life, liberty or property without due process of law, this section of the Federal Constitution was not violated in this case, and the conclusion of the Petitioner in his brief and petition that the right of a prisoner tried to be free from shackles is an inherent and fundamental right is not sustained by authority, but the law is to the contrary where the prisoner's record justifies the trial court in keeping the prisoner handcuffed. As we said above, this claim of violation of the Federal Constitution was raised for the first time in the petition for rehearing and was an afterthought after the Kentucky Court of Appeals had affirmed the conviction.

This case does not involve a violation of equal protection of the law nor due process as guaranteed by the Federal Constitution, and for the above reason we respectfully submit that this Court has no jurisdiction of this matter under the record.

ISSUES RAISED AND OPINION OF KENTUCKY COURT

The only issue raised upon Petition for Writ of Certiorari is the alleged error of the lower court and its affirmance by the Kentucky Court of Appeals in keeping the Petitioner handcuffed during the trial, and in order that this Court may see the reasons assigned by the Court of Appeals in affirming the judgment and denying this alleged error, we will quote from the opinion the matter pertinent as follows:

> "A. Was it reversible error to keep appellant in handcuffs during the trial? As a general rule, we would condemn such a practice. A court would hardly be justified in permitting this to be done in one murder case out of an average hundred coming to trial. However, we have heretofore announced the rule to be that of permitting shackles on defendants during trials in exceptional cases, in cases where the trial courts appeared to have encountered some good grounds for believing such defendants might attempt to do violence or to escape during their trials. See the cases of Marion v. Commonwealth, 269 Ky. 729, 108 S. W. (2d) 721; Blair v. Commonwealth, 171 Ky. 319, 188 S. W. 390. It appears to be the generally prevailing rule in many jurisdictions of this country that trial courts will be upheld in their exercise of thoroughly sound and reasonable discretion in the matter of keeping certain defendants in shackles during their trials. See 14 Am. Jur. 855. And now applying this rule of sound discretion, exercisable in exceptional cases, to our trial now under consideration, we perceive that Tunget was a man of demonstrated desperation. He had already been convicted of murder and had been given a life sentence. Before he had served a year of the time necessary to qualify him for a parole, he had procured a gun from the outside and in nerveless fashion had herded four stalwart guards into his own cell. Thereafter, he had shot and killed the associate warden and had then shot at or through two other guards in pursuing his raging, reckless intent to escape, regard-

less of the resulting consequences. Confinement had not curbed him, courtroom solemnity had not cowed him, armed guards had neither daunted nor discouraged him. *Therefore, this appears to have been an exceptional case and we are not prepared to say that the trial court abused sound discretion in keeping handcuffs on Tunget during the trial. If this was not an exceptional case, then we would hardly know how to recognize one. But again we say that ordinarily this practice should not be followed and usually it would be condemned by this court.*" (Emphasis ours) . . . . .

"As humanitarians, we would gladly give this young man another chance, although he has already had more than one chance. As a judicial body, we are concerned only with the fairness of his trial. We perceive that he had the benefit of skilled counsel, the opportunity to testify in his own behalf, the right of procurement of his own witnesses, the right to face his accusers at the trial, the right to select his own jury from among his peers, the opportunity to submit his theory of innocence to that jury for their decision. So far as we can ascertain, he has had his full day in court and he has also had a fair trial, possibly not entirely free from error, but substantially so and, as we believe, entirely so in the category of those errors known as prejudicial."

The above quotation from the opinion shows what a desperate character the Petitioner is and that the decision of the lower court as shown by the record "for the purpose of safety and to preserve order it is best for him to remain in handcuffs" was a correct and proper ruling under the facts.

We may add in addition to what the opinion of the Court of Appeals of Kentucky stated as above quoted, that the record establishes by the Petitioner's own evidence including his expert, that the Petitioner had a fixation or obsession amounting to a mania of escape, and his actions previous to this trial authorized the lower court in keeping this desperado in handcuffs during the trial. It was a

matter of a sound discretion in the lower court, and that the lower court did not abuse this sound discretion, this Court can readily see by reviewing the record.

Here the Petitioner is a man who has been convicted and given a life imprisonment for murder and was incarcerated in the Eddyville penitentiary for life. This was in April, 1945. Within eight months thereafter he procures a pistol, presumably through the assistance of his wife, and when the guards come to his cell, having learned of his procurement of a pistol, he forces them at the point of this pistol to let him out of the cell, then locked the cell on the guards, and when the assistant warden, Gumm, was approaching, he deliberately murdered him, and then also shot at another guard, who, however, overpowered him.

The record shows by the evidence of another prisoner, that he said "if he threw the pistol on Gumm and he did not open the gate and let him out, he would shoot hell out out of him." This was the day preceding the murder of Gumm, and that he was a desperate character without conscience, cold-blooded and cruel, is shown by his actions in this case. That the lower court acted right and for the protection of the court officials, spectators and the court's work cannot be questioned under the facts in this case, and the Court of Appeals of Kentucky recognized that the lower court exercised its discretion properly and soundly.

ARGUMENT AND AUTHORITIES

This Court will note in reading the petition and the brief that the petition on page 7, predicates its assignment of error on the trial court's abuse of discretion in refusing to sustain the motion made by Petitioner to be relieved of shackles. While in the brief on pages 22 and 23, it is argued "that the right to be tried free from shackles is so fundamental in due process that a refusal of the right is a denial of due process", and further, on page 23, that the

Petitioner had an "inherent and fundamental right" to be tried free from shackles.

This is far from the law in the matter and the inconsistency of the petition and brief can be readily noted by this Court. If it is a matter of discretion with the court, certainly it could not be a fundamental and inherent right. The whole argument in Appellant's brief on the trial before the Court of Appeals of Kentucky was based on the alleged abuse of discretion in keeping the prisoner manacled.

That we are right in our statement that this is a matter addressed to the sound discretion of the trial court, we will quote from 23 Corpus Juris Secundum, page 313, Section 977 (Criminal Law) as follows:

> "Shackling accused. During the trial accused should be free from shackles, except in so far as the trial court, in its sound discretion, deems them necessary to prevent the escape of accused or his forcible release, to restrain him from doing violence to others, or from injuring himself, or to prevent such misconduct as would obstruct the work of the court; and such exceptions apply particularly while accused is being brought into or taken from court."

The Kentucky Court of Appeals held that the lower court did exercise a sound discretion and the quotation from the opinion so shows. That this is the universally recognized rule in all jurisdictions we will now quote from a number of authorities of other States.

One of the leading cases is McPherson v. State, 178 Ind. 583, 99 N. E. 984, wherein the court said:

> "It has been held, however, that whether it is necessary for a prisoner to be restrained by shackles or manacles during the trial must be left to the sound discretion of the trial judge."

This quotation is supported by authorities cited from fourteen States and two leading text book authorities, Bishop and Wharton.

There is nothing in the record to show in this case that the trial judge in view of this prisoner's character and record abused his discretion and the law on this particular point is set out in State v. Allen (W. Va.), 38 S. W. 239, as follows:

> "When the record is silent as to whether there was or was not any valid excuse for retaining the irons upon the prisoner during the trial, the appellate court will presume that the court below exercised a sound and reasonable discretion in not causing them to be removed."

Again quoting State v. Hanrahan, 207 N. W. 224, 49 N. D. 434, the Supreme Court of North Dakota said:

> "It is the universal rule that while no unreasonable restraint may be exercised over the defendant during the trial, yet it is in the discretion of the trial court to determine what is and what is not reasonable restraint."

Coming now to the State of Kentucky where this principle of law and rule is recognized, we will quote from Marion v. Commonwealth, 269 Ky. 729, 108 S. W. (2d) 721, as follows:

> "Whether defendant should be shackled in court to prevent escape or protect others from attack by defendant rests on the discretion of the court based on reasonable grounds of apprehension."

This Court will note that in the Kentucky case of Blair v. Commonwealth, 171 Ky. 319, 188 S. W. 390, which was decided some twenty years previous to the above case of Marion v. Commonwealth, the Court of Appeals of Ken-

tucky recognized the right of discretion of the lower court in these matters and based its decision in this Blair case "under the circumstances as appear to have attended the handcuffing" in that case.

We will go further. In the case of Hall v. State, 199 Ind. 292, 159 N. E. 420, which in facts is somewhat similar to the Petitioner's case, the Supreme Court of Indiana held as follows, quoting syllabus:

> "Where record showed that defendant, accused of murder while engaged in robbery, attempted to escape prison once, and his codefendant did escape, that defendant secured revolver while in prison, and shot it, directed at sheriff, and, for reason that effort might be made to release him during trial, refusal to sustain his motion objecting to shackling him during trial, because it infringed his rights, under Const. art. 1, sec. 13, 15 (Burns' Ann. St. 1926, Sec. 65, 67), to fair trial, and guaranty against treatment with unnecessary rigor, was within trial court's discretion."

Now in answer to the claim that the facts authorizing the court's order to keep the prisoner in handcuffs must appear at the trial, we will cite and quote to this Court from the opinion of Pierpont v. State, 49 Ohio App. 77, 195 N. E. 264, as follows:

> "While the appellant admits that the necessity for a prisoner to be restrained by shackles or manacles during the trial must be left to the sound discretion of the trial judge, as decided by the court in McPherson v. State (1912) 178 Ind. 583, 99 N. E. 984, he maintains that there must be some evidence offered to the court at the trial of imminent danger of escape or violence to others, based upon the conduct of the prisoner at the time of the trial, to authorize the court to exercise its discretion to require physical restraint of the prisoner, and cites State v. Kring (1877) 64 Mo. 591, and State v. Williams (1897) 18 Wash. 47, 50 P. 580, 39 L. R. A. 821, 63 Am. St. Rep. 869."

"In that case the court also held that it was not necessary that the court's action be based wholly upon matters that occurred at the trial, and this would seem to be the better rule. We quote again from the opinion, 199 Ind. at page 603, 159 N. E. 420:

"Appellant's contention that knowledge upon which a court bases its discretion to refuse a prisoner's request that fetters be removed from his legs must come only from evidence offered at the trial does not appear to us to be sound."

All the authorities seem to state that there is an exception to the rule that the defendant must not be shackled, handcuffed, or bound during trial where there is evident danger of escape or rescue. Blair v. Commonwealth, 171 Ky. 319, 188 S. W. 390."

From the above quotations from authorities of other States, this Court can readily see that the statement in Petitioner's brief that the universal rule except Kentucky denied shackling, is unauthorized, and the law is exactly to the contrary. Every case cited in the Petitioner's brief predicates the denial upon the grounds that there was no "pretense of necessity for such restraint" as in the California case cited, or no "evident necessity" as in other cases cited. Even the Petitioner's authorities recognized the rule that the court has discretion in this matter and when there is evident, or in its judgment reasonable necessity for the shackling, it is permitted. The brief goes to the extremity of arguing that this denies a resident of Kentucky equal protection of the law which is accorded in all the other States when as we have shown above, all text writers and States recognize the principle of shackling under the circumstances of each case, and a sound discretion exercised in the matter. That this trial of Appellant did not violate his rights to due process, we refer back to the quotation from the opinion of the Kentucky Court of Appeals conclusively showing that his trial was a fair trial. That this was a cold-blooded and premeditated murder to escape cannot be questioned, and it makes no difference

how many trials this man has, he is guilty of this willful and premeditated murder and deserves the punishment inflicted. He had no defense to this case except a claim of mental abortions when the facts in this case showed a premeditation and determination to shoot his way out of the penitentiary irrespective of the consequences.

CONCLUSION

Respondent, the Commonwealth of Kentucky, therefore respectfully submits that the raising of a Federal question in this case as was done on petition for rehearing is an afterthought, and furthermore, that this has no basis under the two alleged provisions of the Constitution relied on. We further respectfully submit that the action of the lower court and its affirmance and approval by the Kentucky Court of Appeals was proper, and certainly the court who knew the facts and knew the desperate character of the Petitioner was a better judge of the reasonableness and propriety of his order than an Appellate Court, and it is a universal rule unless there is a flagrant abuse of discretion, the Appellate Courts will not interfere with the discretion of the trial court. And as the Court of Appeals of Kentucky said in its opinion, "if this was not an exceptional case, then we would hardly know how to recognize one." We, therefore, respectfully ask that Petition for Writ of Certiorari be denied.

Respectfully submitted,

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